

STEPHANIE M. HINDS (CABN 154284)
Acting United States Attorney

HALLIE HOFFMAN (CABN 210020)
Chief, Criminal Division

KEVIN J. BARRY (CABN 229748)
AJAY KRISHNAMURTHY (CABN 305533)
LINA Y. PENG (NYBN 5150032)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-6840
FAX: (415) 436-7234
Email: kevin.barry@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CASE NO. CR 17-0533 EMC
)	
Plaintiff,)	UNITED STATES' OPPOSITION TO
)	DEFENDANT'S MOTION FOR RELEASE
v.)	
)	
RAYMOND FOAKES, et al.,)	Hearing: August 18, 2021
)	Time: 10:30 am
Defendants.)	
)	Hon. Joseph C. Spero

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STATEMENT OF FACTS

A. Procedural History of the Detention Issue

A. Procedural History of the Detention Issue

Defendant was charged with those assaults, as well as other offenses, through a Form 12 petition. Defendant admitted to the non-assault charges, including association with members of the Hells Angels, on March 14, 2017. *Id.*, Dkt. 337. Judge Alsup sentenced Defendant to a term of 24 months in custody as a result. *Id.*, Dkt. 336. He finished that term in roughly September 2018. *See id.*, Dkt. 336 (24-month term); Dkt. 328 (warrant for the Form 12 returned executed on November 30, 2016).

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1 conditions will reasonably assure the safety of the community, the Court orders that he be detained
2 pending trial.” *Id.* at 1:25-27. The Court found that the fact that Defendant was serving a term of
3 supervised release when the government alleges he committed the crimes in the Superseding Indictment
4 was a critical factor. It further observed that:

5 Defendant has a lengthy criminal history, and he has repeatedly had his periods of
6 probation or supervised release amended or revoked because of new criminal activity.
7 The Court’s review of his record indicates a number of instances where Defendant failed
8 to complete a period of court supervision without incident. These include the 1995 and
9 1996 revocations of his probation for a misdemeanor illegal possession of a weapon
10 conviction; the 2000 parole violation and return to custody for his evading a police
11 officer, false imprisonment, and possession of methamphetamine felonies; the 2010
12 revocation of his supervised release stemming from a conviction for violent crime in aid
13 of racketeering; and the 2016 revocation of his term of supervised release from a wire
14 fraud and money laundering conviction.

15 *Id.* at 2:5-13. The Court concluded that “Defendant’s family and community support are not sufficient
16 to mitigate this history of criminal convictions and poor performance while on supervision.” *Id.* at 2:14-
17 15.

18 On July 22, 2019, Defendant moved to reopen the issue of his detention. The only new issues he
19 raised were: (1) “Since the last appearance before this Court, the half-way house is now available”; and
20 (2) “it appears that FOAKES will not face trial for another two-years.” Dkt. 721 at 12:19-20.
21 Defendant presented the first point as new and material fact sufficient to reopen the issue of detention.
22 Defendant presented the second point in the form of a due process challenge to his detention. On
23 August 9, 2019, this Court denied the motion and maintained the order remanding Defendant to custody.
24 Dkt. 759 (Minute Order); Dkt. 863-1 (Transcript of August 9, 2019 hearing).

25 On November 5, 2019, Defendant moved Judge Chen to reverse that order and to allow him to
26 be released on bond. Dkt. 863. On November 20, 2019 Judge Chen denied that motion and affirmed
27 this Court. Dkt. 876.

28 On November 10, 2020, Defendant moved to reopen the issue of detention once again. Dkt.
1284. He raised the same issues as he did in 2019. While that motion was pending, Defendant
requested an emergency temporary release to visit his dying mother. This Court granted the motion with
strict conditions, Dkt. 1300, but Defendant’s mother passed away before the temporary release could be

1 effected. Dkt. 1302. The Court then held a hearing on the motion for general release and denied it.
2 Dkt. 1331. Defendant appealed to Judge Chen, and Judge Chen affirmed this Court in December 2020.
3 Dkts. 1339, 1375.

4 **B. Case Developments Since December 2020**

5 As discussed below, the only basis for Defendant's motion for release is the argument that his
6 continued pretrial detention violates due process. The Court found nine months ago that detention to
7 that point did not give rise to a due process claim, so the issue now is whether the additional time
8 changes that conclusion.

9 In the nine months since the Court found no due process violation, the parties have advanced the
10 case.¹ The government has continued to produce discovery including significant volumes of electronic
11 data; it has litigated a *Daubert* issue regarding the government's CAST expert (cell-site location); it has
12 litigated multiple motions for severance, motions to dismiss, motions for bills of particulars, and
13 motions to continue the trial. Most significantly for Defendant Foakes, the Court has also litigated a
14 motion for an Order to Show Cause regarding a breach of the Attorneys' Eyes Only Protective Order by
15 Defendant's counsel and a motion to add Defendant Foakes to the defendants to be tried in Trial Group
16 One, whose trial will commence in January 2022. The latter two issues are critical for the Court's
17 assessment of Defendant's due process argument.

18 **1) The Order to Show Cause Proceeding**

19 In January 2019, the Court entered an Attorney's Eyes Only Protective Order to govern the
20 government's production and the defense's handling of sensitive information, particularly information
21 regarding witnesses who provided information about the Hells Angels. Dkt. 517. In the Summer of
22 2019, Judge Beeler ordered the government to produce materials that would serve to identify
23 cooperating witnesses to the defense under that AEO Protective Order, along with some additional
24 precautions. The government made productions pursuant to that order in August and October 2019.

25 [REDACTED]
26 [REDACTED]

27
28 ¹ There have been nearly 450 docket entries since Judge Chen affirmed the Court's denial of Defendant's earlier due process motions in December 2020.

[REDACTED]

2) The Government's Efforts to Bring Defendant Foakes to Trial

As Defendant has indicated in his motion, there is an initial group of defendants scheduled to go to trial in January 2022, and Defendant is not among that group. Dkt. 1941 at 8:21-22. What he omits is that the government has repeatedly requested that Defendant Foakes be included among that first group of defendants. Dkts. 1007, 1074. Unfortunately, Judge Chen elected to have an initial group of only

1 three, with trial set initially set for October 2021, later moved to January 2022 at other defendants'
2 request, and without Defendant Foakes.

3 Even after Judge Chen's decision to exclude Defendant from the first trial group, the government
4 continued its efforts to have Defendant brought into that trial. In January 2021, roughly a month after
5 Judge Chen denied Defendant's last due process challenge, the government indicated that it would seek
6 to include him in Trial Group One if conditions related to the COVID-19 pandemic improved. *See* Dkt
7 1425 (Transcript of January 13, 2021 Hearing).

8 [Government counsel:] [W]e would like to keep the [October 2021] trial date. You
9 know, we have an interest in getting, not only Mr. Wendt, but also Mr. Foakes's trial. If
10 there is some break in the pandemic and we're able to move forward in the normal
11 course, we would, as we have indicated, we would ask to put Mr. Foakes in that trial
group so he can get to trial, as well as the defendants who are out of custody.

12 *Id.* at 100:11-17. In later hearings, the government continued to express its desire to have Defendant
13 tried first.

14 [Government counsel:] But I just wanted to repeat that again so, sort of, Mr. Foakes is on
15 notice that we are trying to get him his trial as quickly as possible, but I don't know if it
16 will work. But, again, that's the Government's thinking. We would prefer to have him,
since he's in custody, in that first trial group, if at all possible.

17 Dkt. 1551 at 47:1-11 (Transcript of February 24, 2021 hearing).

18 On June 23, 2021, the Court issued General Order 78, which lifted many of the pandemic-related
19 restrictions on Court operations enacted through General Orders 72 and 73. In light of that order and the
20 opening of society in general through mass vaccinations, the government moved to expand Trial Group
21 One and to include Defendant Foakes in that initial group. Dkt. 1865.

22 Defendant opposed that motion. Dkt. 1875. Foakes offered several reasons why he could not go
23 to trial in January 2022. The first was availability of counsel. "Foremost among the host of problems
24 this late request presents is the fact that the undersigned counsel is scheduled for trial in a homicide case
25 before the Honorable William H. Alsup, *United States v. Robert Manning, et al.*, CR-19-0313-WHO, on
26 December 6, 2021." *Id.* at 2:1-3. The second basis was a claim that he would be prejudiced by
27 inclusion in a trial with defendants who were charged with murder—a crime in which he did not
28

1 participate. “It must be pointed out that FOAKES has always contended that he should not be part of the
2 first trial group because he was not charged with either the conspiracy to commit murder or the murder
3 of Joel Silva, Counts Two and Three of the Superceding Indictment.” *Id.* at 2:15-18. The third basis for
4 his opposition was the pendency of the Order to Show Cause proceeding.

5 Finally, there is the issue of the Order to Show Cause (OSC) brought against the
6 undersigned. Based on an accusation dating over a year before the government filed its
7 OSC, and now eight months into the OSC proceedings, a recommendation has been made
8 which only further complicates the ability of the undersigned to properly prepare for a
9 trial which is scheduled to begin January 10, 2022. It is anticipated that final resolution
10 of the matter is months away but the immediate effect is to make it impossible to be
11 ready for trial with the first group. Moreover, there is no simple solution to this problem
12 and possible remedies do not factor in the ability of the undersigned to prepare for an
immediate trial. The issues may crystalize, or even go away, with time and re-
designation of certain “protected” discovery. Nevertheless, such [a] solution will not be
available in time to go to trial with the first trial group.

13 *Id.* at 2-3.

14 Judge Chen denied the government’s request to add Defendant to the first trial group. Dkt. 1897
15 (Minute Order from July 9, 2021 hearing). The Court based its decision largely on the findings and
16 recommendations made by Judge Kim in relation to the Order to Show Cause Proceeding. “. . . I think
17 it’s obvious now with the OSC ruling [by Judge Kim] and now the appeal, which I will be hearing
18 shortly, that certainly complicates things and makes it particularly unfeasible, it seems to me, to have
19 Mr. Foakes included for trial[.]” Dkt. 1934 at 7:12-14 (Transcript of July 9, 2021 hearing). “I think the
20 situation with Mr. Foakes is obvious. There’s no way that with the counsel situation and the issues that
21 have arisen out of the OSC, that that’s going to be resolved in a way that will allow him to prepare for
22 trial.” *Id.* at 17:6-9.

23 Three and a half weeks after Judge Chen’s order denying the government’s request to include
24 him in Trial Group One, Defendant filed the motion for release currently before the Court. Dkt. 1941.
25 It is essentially identical to the motion the Court denied last year, with the only change being the
26 additional nine months of detention. *Compare id. with* Dkt. 1284.

ARGUMENT

I. Defendant Presents No Basis To Reopen The Detention Hearing

The Bail Reform Act provides a mechanism for re-opening a detention hearing, but only “if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue” of detention. 18 U.S.C. § 3142(f). Courts interpret this provision strictly. *United States v. Ward*, 63 F. Supp. 2d 1203, 1206 (C.D. Cal. 1999). Under Section 3142(f), defendants must meet two requirements: (1) they must demonstrate that information now exists that was not known to the movant at the time of the initial detention hearing; and (2) they must establish that the new information is material to release conditions regarding flight or dangerousness. *United States v. Martin*, No. 13–CR–00466–JSW (KAW), 2015 WL 3464937, at *2 (N.D. Cal. May 29, 2015) (citing *United States v. Dillon*, 938 F.2d 1412 (1st Cir. 1991)). “In other words, the unknown information is material if it increases the chances the defendant appears for his criminal hearing or decreases the danger the defendant poses to an individual or the community as a whole.” *Id.*

Here, Defendant offers no new material information. The only point he presents is the fact that he has remained in pretrial detention. “While courts have interpreted §3242(f) strictly, holding that hearings should not be reopened if the evidence was available at the time of the initial hearing, in this case it is the unreasonable length of the pre-trial detention which is the reason for reopening the detention hearing.” Dkt. 1941 at 9:3-6.

In the context of Section 3142(f), this is insufficiently new and material. “Nor can the length of his current or potential future detention be considered under this section [18 U.S.C. § 3142(f)] since it is not material to the issue of risk of flight or dangerousness.” *United States v. Hare*, 873 F.2d 796, 799 (5th Cir. 1989).² The duration of pretrial detention can, however, give rise to a due process challenge, discussed below, but that is a different from reopening the detention hearing under the Bail Reform Act. *See id.* at 801 (rejecting effort to reopen detention under Section 3142(f) but remanding for due process analysis); *see also United States v. Accetturo*, 783 F.2d 382, 384 (3d Cir. 1986) (“Thus, a determination under the Bail Reform Act that detention is necessary is without prejudice to a defendant petitioning for

² Defendant cites *Hare* in his motion. Dkt. 1941 at 9:10-11.

1 release at a subsequent time on due process grounds.”).

2 For this reason, the Court must deny Defendant’s bid to reopen the detention hearing. Defendant
3 is procedurally barred from re-litigating the merits of his detention, and the Court’s previous findings
4 that Defendant poses both a flight risk and a danger to the community and that the risk cannot be
5 mitigated by any condition or combination of conditions remain in place.³

6 Defendant’s motion does, however, pose a question for the Court to adjudicate: does the fact
7 that he has been in custody for slightly less than three years pending trial so offend due process that he
8 must be released? This due process challenge based on the length of detention is properly before the
9 Court, but the lack of a due process violation is what guided the Court’s earlier denials of essentially the
10 same request for relief.

11 **III. Defendant’s Pretrial Detention Does Not Violate Due Process**

12 **A. The Legal Framework**

13 There is no bright line test to determine when a prolonged pretrial detention becomes a
14 constitutional violation. The Due Process Clause of the Fifth Amendment provides that “[n]o person
15 shall . . . be deprived of life, liberty, or property without due process of law.” U.S. Const. Amend. V.
16 The Due Process Clause plainly prohibits punishing a pretrial detainee prior to an adjudication of guilt.
17 *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). However, it is well settled that a defendant accused of
18 committing a crime may be detained prior to a formal adjudication of guilt. *Id.* (citing *Gerstein v Pugh*,
19 420 U.S. 103, 111–14 (1975)); *see also United States v. Salerno*, 481 U.S. 739, 746 (1987) (“pretrial
20 detention under the Bail Reform Act is regulatory, not penal”). There is little guidance in the case law,
21 however, regarding the precise point at which pretrial detention violates due process. *See, e.g., United*
22 *States v. Orena*, 986 F.2d 628, 631 (2d. Cir. 1993) (length of detention alone is not dispositive and “will
23 rarely by itself offend due process”); *United States v. Vondette*, 5 Fed. Appx. 73, 75-76 (2d. Cir. 2001)
24 (holding that defendant’s 40 month pretrial detention did not violate due process where defendant was
25 leader of a drug enterprise and faced life imprisonment); *United States v. El-Hage*, 213 F.3d 74, 78-81

27 ³ Because Section 3142(f) bars reopening of the issue of detention, the government will not
28 repeat its arguments for Defendant’s detention. Should the Court wish to review them, the government
respectfully directs the Court its opposition to Defendant’s prior motions to revoke the release order.
Dkts. 748 and 870.

1 (2d. Cir. 2000) (finding that a 30 to 33 month pretrial detention did not violate defendant’s due process
2 rights); *United States v. Milan*, 4 F.3d 1038 (2d. Cir. 1993) (a 30 month period of detention did not
3 violate defendant’s due process rights).

4 The Ninth Circuit recognized as much thirty years ago, noting that “[s]everal Circuits have
5 recognized that the length of pretrial detention raises a constitutional issue at some point The
6 Supreme Court, however, has declined to identify at what point pretrial detention might be excessively
7 prolonged and therefore punitive rather than regulatory.” *United States v. Gelfuso*, 838 F.2d 358, 359
8 (9th Cir. 1988) (citing *Salerno*, 481 U.S. at 747 n. 4.). The Ninth Circuit explained that “the due process
9 limit on the length of pretrial detention requires assessment on a case-by-case basis. We consider the
10 length of confinement in conjunction with the extent to which the prosecution bears responsibility for
11 the delay that has ensued.” *Gelfuso*, 838 F.2d at 359. There are few cases, however, implementing that
12 guidance.

13 Recently, the Ninth Circuit found no due process violation with a 21-month period of pretrial
14 detention, but it suggested that additional time could impact due process. *United States v. Torres*, 995
15 F.3d 695, 708 (9th Cir. Apr. 23, 2021) (citing *Gelfuso*, 838 F.2d at 359-60). *Torres*, however, involved
16 significantly less serious charges than Defendant faces here. That case arose from a traffic stop where
17 the defendant was found with of two rounds of ammunition and less than two ounces of
18 methamphetamine. *Id.* at 699.

19 As an initial matter, it is important to identify the parameters of the Due Process Clause of the
20 Fifth Amendment. The Supreme Court succinctly described the relevant concepts in *Salerno*:

21 This Court has held that the Due Process Clause protects individuals against two types
22 of government action. So-called “substantive due process” prevents the government
23 from engaging in conduct that “shocks the conscience,” *Rochin v. California*, 342 U.S.
24 165, 172, [], or interferes with rights “implicit in the concept of ordered liberty,” *Palko*
25 *v. Connecticut*, 302 U.S. 319, 325–326, [] (1937). When government action depriving a
26 person of life, liberty, or property survives substantive due process scrutiny, it must still
27 be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, [] (1976).
28 This requirement has traditionally been referred to as “procedural” due process.

481 U.S. at 746. The question raised by Defendant’s motion is one of substantive due process; that is,
whether his continued pretrial detention (on charges that include racketeering, maiming, sexual assault,

1 and witness intimidation) “shocks the conscience” or impermissibly interferes with rights “implicit in
2 the concept of ordered liberty.”

3 The Supreme Court has recognized for more than a century that the constitutional right to a
4 speedy trial is not “so unqualified and absolute” that it must prevail over “the demands of public
5 justice.” *Beavers v. Haubert*, 198 U.S. 77, 86 (1905). Instead, “[i]t is consistent with delays [and]
6 depends upon circumstances . . .” *Id.* at 87; *see also Vermont v. Brillon*, 556 U.S. 81, 89-90 (2009). The
7 Sixth Amendment does not establish a requirement for a defendant to proceed to trial within a certain
8 number of days. *See Brillon*, 556 U.S. at 89–90. To the contrary, the concept of “speedy” depends in
9 each case upon both the private and public interests in an efficient, fair, and effective justice system.
10 *See United States v. Loud Hawk*, 474 U.S. 302, 312-13 (1986). In striking the appropriate balance, the
11 courts have recognized that the contours of the right are difficult to describe because what may be
12 considered “speedy” is necessarily specific to each case. In attempting to define the meaning of the
13 word “speedy” under the Sixth Amendment, the Supreme Court has found it “‘amorphous,’ ‘slippery,’
14 and ‘necessarily relative.’” *Brillon*, 556 U.S. at 89 (quoting *Barker v. Wingo*, 407 U.S. 514, 522
15 (1972)). For example, “delay that can be tolerated for an ordinary street crime is considerably less than
16 for a serious, complex conspiracy charge.” *Barker v. Wingo*, 407 U.S. 514, 531 (1972). The same is
17 true here regarding the reasonableness of Defendant’s continued pretrial detention. *See Gelfuso*, 838
18 F.2d at 359 (requiring case-by-case analysis for each defendant).

19 Case law has not provided a framework for analysis of whether pretrial detention violates due
20 process, but the basic principle is that the government interest in detaining the defendant must be
21 weighed against the length of detention. *See. e.g., United States v. Ailemen*, 165 F.R.D. 571, 578 (N.D.
22 Cal. 1996). Courts also must consider the evidence in favor of detention and whether the government is
23 responsible for pretrial delay. *Gelfuso*, 838 F.2d at 359; *Torres*, 995 F.3d at 708.

24 **B. The Government Interest Merits Pretrial Detention In This Case**

25 In the present case involves a complex RICO enterprise that existed over an extended period,
26 with allegations of VICAR murder, multiple violent assaults, home invasion robberies, extortion, illegal
27 weapons possession, witness intimidation, and other crimes. *See* Dkt. 374 (Superseding Indictment).
28 Defendant is specifically charged with VICAR maiming, assault with a firearm, and witness

1 intimidation. The Indictment also alleges that he sexually assaulted Victim 6, and then threatened her
2 and her family if she reported the assault. Because Defendant agreed and understood that the
3 racketeering acts included murder, he is subject to a term of life imprisonment.

4 As discussed above, and as the Court has already found, Defendant poses a significant danger to
5 the community, and no conditions or combination of conditions can mitigate that. The government will
6 establish at trial that Defendant plays a significant role within the Sonoma County Hells Angels RICO
7 enterprise (HASC). Defendant is a past president of HASC, and he continued to exert significant
8 influence when he stepped down from the position due to a prior incarceration. Part of the reason for
9 Defendant's stature within the enterprise is the central role he played in a riot between the Hells Angels
10 and their bitter rivals, the Mongols outlaw motorcycle club, that took place in Laughlin, Nevada in 2002.

11 The Laughlin riot occurred during a motorcycle rally that was attended by large numbers of
12 Hells Angels and Mongols, as well as many more law-abiding motorcycle enthusiasts. The two groups
13 came into conflict as they were congregating outside a bar in a casino. Because of their traditional
14 enmity, tensions ran high, and Defendant sparked the riot when he kicked a Mongol in the chest. A
15 massive brawl erupted, with Hells Angels and Mongols fighting with guns, knives, hammers, and
16 wrenches. Minutes later, three people were killed (two Hells Angels and one Mongol) and dozens were
17 injured. Much of the melee was recorded on video, including Defendant's action setting it in motion.⁴
18 Despite the deaths of two members, Defendant's role in Laughlin made him famous and respected
19 throughout the Hells Angels.

20 In this case, Defendant is not charged with VICAR murder, but his alleged crimes are notably
21 violent regardless. The charges of VICAR maiming and assault with a deadly weapon pertain to an
22

23 ⁴ Violence between Hells Angels and Mongols did not stop with Laughlin. For instance, in
24 *United States v. Ablett*, CR 09-0749 MMC (N.D. Cal. 2009), the defendant was a member of the
25 Mongols motorcycle gang who came to San Francisco hunting for Hells Angels. Ablett went to a Hells
26 Angels bar and displayed his Mongols clothing. The President of the San Francisco Hells Angels then
came to confront him, and the two fought. Ablett stabbed the Hells Angel in the chest, and when he
collapsed to the street, the defendant took out a gun, walked over the victim, and shot him in the head.
After trial, the jury convicted Ablett of VICAR murder and related crimes.

27 The government presented additional evidence of extensive violence between the Hells Angels
28 and Mongols in the declaration of its enterprise expert during a *Daubert* challenge to his testimony. *See*
Dkt. 1084-1 (Declaration of Jeremy Scheetz) (detailing 55 acts of violence between Hells Angels and
Mongols from 1977 to 2018).

1 hours-long beating of Victim 5. During that assault, another Hells Angel pistol-whipped Victim 5; he
2 was beaten with a baseball bat; and he was repeatedly punched and kicked. Victim 5's tattoos were
3 forcibly covered over with a tattoo gun, and Defendant took that tattoo gun and crudely etched lines in
4 Victim 5's face. During the beating, HASC members fractured the orbital bone below Victim 5's eye,
5 affecting his vision, among other injuries, and Victim 5 was hospitalized as a result, and those injuries
6 required follow-up surgery over a year later. During the beating, Defendant indicated that he was going
7 to take the firearm that was used to pistol whip Victim 5 and was going to shoot the victim with it.
8 Other Hells Angels stopped him from doing so, however.

9 While the beating was taking place, Defendant called Victim 6 and told her that he needed to
10 explain to her what was happening to Victim 5. Victim 6 drove to meet Defendant, and when she
11 picked him up, Defendant took her to a secluded location and sexually assaulted her. He forced her to
12 perform oral sex on him; he digitally penetrated her; and he threatened her and her family.

13 This violent conduct took place just over a month after Defendant was released from a 70-month
14 prison term for a prior felony conviction in this district. *See* CR 11-0624 WHA, Dkt. 322.

15 These allegations will be supported by witness testimony, phone records, medical records,
16 photographs, home security video, DNA, and other evidence.

17 Thus, the government has a strong regulatory interest in detention, particularly as this behavior—
18 committing crimes while under court supervision—is consistent with Defendant's previous conduct.
19 "The Court's review of his record indicates a number of instances where Defendant failed to complete a
20 period of court supervision without incident." Dkt. 447 at 2:7-8.

21 This interest must be weighed against the length of pretrial detention. Defendant notes that he
22 has been detained for slightly under three years because of the current charges in the Superseding
23 Indictment. Prior to the return of the initial indictment, Defendant was sentenced to a term of two years
24 for a violation of the terms of his supervised release in a previous case. Dkt. 1941 at 10:4-8. His term
25 ended on September 17, 2018, just under three years ago. *Id.* at 10:8-9.

26 As an initial matter, the critical issue for the Court in considering the motion is whether the
27 current length of pretrial detention—roughly 35 months—violates due process. Defendant also suggests
28 that that his projected pretrial detention before going to trial constitutes a due process violation such that

1 he should be released now. He offers no authority for the proposition that the prospect of future pretrial
2 detention offends due process apart from *United States v. Chen*, 820 F. Supp. 1205 (N.D. Cal. 1992) and
3 *Ailemen*, 165 F.R.D. 571. See Dkt. 1284 at 22.

4 *Chen* does not support this position. While it is true that the court in *Chen* referred to “the tragic
5 prospect of an indeterminate length of pretrial detention” in ordering the defendants released, reading
6 the order makes clear that the court was reopening the detention hearing because of changed
7 circumstances. “In the months since the earlier bail determinations, this case has taken a number of
8 surprising turns, justifying reconsideration of the pretrial release issue for Mike, Kelly and Lucy.” *Id.* at
9 1209. This can also be seen in the court’s extensive discussion of the factors under Section 3142(g). *Id.*
10 at 1207-1210. When discussing the due process issue, the court indicated that it was not relying on
11 future detention; it held that the detention up to that point violated due process. “At some point, a
12 defendant’s Constitutionally-protected interests in due process and a speedy trial overshadow the other
13 pretrial release issues. It is clear that *this point has now been reached* for the three defendants presently
14 before the court.” *Id.* at 1210 (emphasis added). It is also important to note that the only issue with
15 respect to detention in *Chen* was risk of flight, not dangerousness. *Id.* at 1208 (“In the case at bar, there
16 can be no serious contention that release of these defendants poses a danger to the community . . .”)
17 (internal citation omitted).

18 With respect to *Ailemen*, the opinion does refer to the prospect of additional time in custody
19 pending trial, but it also heavily weighed the fact that the defendant had been in custody for more than
20 two years and that he posed only a risk of flight, not a danger to the community. *Id.* 165 F.R.D. at 596
21 (“The government has presented no evidence, however, that Ailemen has ever committed or attempted
22 to commit acts of physical violence.”).

23 *United States v. Gelfuso*, 838 F.2d 358 (9th Cir. 1988), also supports the point that it is the
24 current extent of pretrial detention that courts must analyze, not the prospect of future detention. In that
25 case, the Ninth Circuit referred to the delay that “has ensued.” *Id.* at 359. Other authorities Defendant
26 has previously cited are similarly focused on the extent of time in pretrial detention that has occurred.
27 See, e.g., *United States v. Omar*, 157 F. Supp. 3d 707, 710 (M.D. Tenn. 2016) (“What may have
28 changed is the strength of the Government’s evidence, and what most certainly has changed is the length

1 of the detention that has already been served.”); Dkt. 721 at 17 (citing *Omar*, 157 F. Supp. 3d at 710).

2 *United States v. Accetturo*, 783 F.2d 382 (3rd Cir. 1986), indicates that the key consideration for
3 due process is the amount of time that has already passed in detention. “[W]e decline to hold the Bail
4 Reform Act unconstitutional for omitting the probable duration of pretrial incarceration from its
5 enumeration of factors to be considered by the judicial officer in the initial detention determination.” *Id.*
6 at 388. “Appellants[’] demand for stronger due process protections for detainees awaiting distant trials
7 is thus better met farther down the procedural road.” *Id.* “Moreover, these judgments should reflect
8 such additional factors as the length of the detention that has in fact occurred . . .” *Id.*

9 Defendant’s other authorities discuss the concept of future detention as a factor, but when
10 making determinations regarding due process, each of them relies on the duration of pretrial detention
11 up to the point of the analysis. See *United States v. Hare*, 873 F.2d 796, 801 (3rd Cir. 1989)⁵; *United*
12 *States v. Gonzales-Claudio*, 806 F.2d 334, 343 (2nd Cir. 1986) (continued detention would violate due
13 process); *United States v. Gatto*, 750 F. Supp. 664 (D.N.J. 1990) (time spent in pretrial detention to that
14 point was “substantial”).⁶

15 **C. The Government Has Not Created Delay Since the Last Due Process Order**

16 In addition to weighing the government interest in detention, the Court must also consider
17 whether the government is responsible for the delay. *Gelfuso*, 838 F.2d at 359. In this case, in the nine
18 months since Judge Chen last denied an identical motion for release on due process grounds, the
19 government has worked to move the case forward and repeatedly requested that Judge Chen include
20 Defendant in the first trial group. As discussed above, Defendant objected to going to trial in January
21 2022 with the initial defendants. Dkt. 1875. Defendant cannot claim that the government is responsible
22 for delay when the government urged the Court to hold a trial for him and he objected.

23 The Court did not agree to the government’s request to include Defendant in the first trial group
24 largely because of the conduct that led to an Order to Show Cause. [REDACTED]

25
26 ⁵ In *United States v. Hare*, 873 F.2d 796 (3rd Cir. 1989), the Third Circuit indicated that the
27 future non-speculative length of detention could be a factor for courts to consider, but in conducting its
due process analysis, it focused only on the length of detention up to the point of its order. *Id.* at 801.

28 ⁶ The court in *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986), did not conduct a
due process analysis.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Further, the pandemic has had a continuing and significant impact on court operations since
5 Judge Chen's December 2020 order denying the previous due process motion, and the government
6 cannot be blamed for delays resulting from that unexpected event.

7 The government is not responsible for delay in Defendant proceeding to trial in the months since
8 the Court denied his earlier due process motion. Therefore, those prior orders still stand. "We consider
9 the length of confinement in conjunction with the extent to which the prosecution bears responsibility
10 for the delay that has ensued." *Gelfuso*, 838 F.2d at 359.

11 **D. The Court Has Denied Release In Similar Circumstances**

12 While courts must conduct due process analyses on a case by case basis, see *Gelfuso*, 838 F.2d at
13 359, the Court can look to a recent determination in a similar case, *United States v. Reginald Elmore*,
14 CR 13-0764 WHO (N.D. Cal.). In *Elmore*, the defendant moved for a release on the basis that he had
15 been in pretrial detention for over two years. CR 13-0764 WHO, Dkt. 910 at 9:11 (March 3, 2016
16 Motion for Release) ("Mr. Elmore has been detained since his initial appearance on January 27, 2014.").
17 He projected that the detention would extend to three years by the time of his trial. *Id.* at 9:11-13. Like
18 Defendant Foakes, the defendant in *Elmore* was charged with participation in a violent RICO enterprise.
19 He was also personally charged with specific acts of violence. Unlike Defendant Foakes, however,
20 Elmore was charged with VICAR murder.

21 This Court found that Elmore's detention did not violate due process, and it denied the motion
22 for release. CR 13-0764 WHO, Dkt. 1000 (April 22, 2016 Minute Order). The Court held that the
23 RICO conspiracy and VICAR murder charges represented the highest government interest. *Id.*, Dkt.
24 1937 at 25:6-16 (Transcript of April 22, 2016 motion hearing). It found that Elmore had engaged in
25 dangerous prior conduct. *Id.* It found that the government proffered some evidence to support Elmore's
26 participation in the charged conduct. *Id.* The Court further found that a halfway house cannot protect
27 the public against the type of danger posed by the defendant. *Id.* at 26. It found that a three-year period
28 of pretrial detention was not caused by Elmore. *Id.* In conclusion, the Court found that the three-year

1 period did not violate due process. *Id.* at 27. The Court did not foreclose the possibility that additional
2 time could change its analysis, but it held that “I don’t think the time currently anticipated is excessive
3 [under the Constitution], and we’ll see what happens.” *Id.*

4 Judge Orrick upheld the Court’s ruling. CR 13-0764 WHO, Dkt. 1088 (October 31, 2016 Order
5 Denying Release From Custody). Judge Orrick agreed that Elmore’s “past history of serious criminal
6 conduct and failure to follow the conditions of his prior release make him a significant danger to the
7 community.” *Id.* at 1-2. He found that the government’s interest in detention was very strong,
8 considering the serious nature of the charges and Elmore’s history, which included prior weapons
9 offenses and the violation of his supervised release from his most recent conviction. *Id.* at 2. Judge
10 Orrick observed that pretrial detention to that point had been lengthy, and the delay was not due to
11 Elmore’s actions. In the end, however, he agreed with the Court.

12 This leaves the balancing determination: does the strength of the government’s regulatory
13 interest outweigh the clearly prolonged expected length of Elmore’s pretrial detention,
14 caused in part by the government’s litigation decisions? It does. The government’s
15 regulatory interest is very strong and there is no combination of conditions that could
16 insure the public safety in the event of Elmore’s pretrial release.

17 *Id.* at 3.

18 The projected trial date for defendant Elmore at the time of Judge Orrick’s order was August
19 2017. *Id.* However, Elmore did not proceed to trial at that point.

20 In September 2018, Elmore renewed his due process challenge to pretrial detention, and the
21 Court denied his motion for release once again. CR 13-0764 WHO, Dkt. 1954 (September 14, 2018
22 Amended Minute Order). At the time of the second order, defendant Elmore had been in custody for
23 over four and a half years, and his pretrial detention was projected to be five years, based on his
24 scheduled trial date. *See id.*, Dkt. 1969 at 4 (Transcript of September 14, 2018 detention hearing).⁷ The
25 Court found that this duration of pretrial detention did not violate due process, based on the facts of the
26 case. The facts were essentially the same, but with the addition of more time spent in pretrial detention
27 and with the fact that some of the evidence against Elmore had been tested in a trial against two co-

28 ⁷ Defendant Elmore eventually pleaded guilty on May 3, 2019, the day before jury selection was
scheduled to begin. CR 13-0764 WHO, Dkt. 2110.

1 defendants, which resulted in convictions. *Id.* at 5. Judge Orrick upheld the Court’s order and denied
2 the motion for release on due process grounds. *Id.*, Dkt. 1960 (October 25, 2018 Minute Order).

3 Defendant Elmore appealed Judge Orrick’s ruling to the Ninth Circuit. CR 13-0764 WHO, Dkt.
4 1962 (November 1, 2018 Notice of Appeal). The Ninth Circuit affirmed. *Id.*, Dkt. 1973 (December 13,
5 2018 Ninth Circuit Order). “The district court did not err in holding that the pretrial detention in this
6 case has not been excessively prolonged or violative of due process under the circumstances here.” *Id.*

7 The similarities between the *Elmore* case and Defendant Foakes’ situation are striking. Both
8 defendants have been charged with RICO conspiracy and VICAR crimes. Granted, Elmore’s crime of
9 VICAR murder is more serious, but Defendant Foakes’ participation in a brutal assault and maiming,
10 coupled with a sexual assault, is not substantially less grave. Second, both defendants have violent
11 criminal histories. Elmore participated in the shooting of a rival gang member’s funeral⁸; and Defendant
12 Foakes participated in a riot that left multiple people dead and dozens injured and committed two violent
13 assaults within weeks of being released from prison. Third, both defendants committed serious offenses
14 while on supervised release.

15 The government submits that based on the facts presently before the Court—the strong
16 government interest in detention, balanced against roughly two years in pretrial detention—weigh
17 heavily against any claim that Defendant Foakes’ due process rights have been violated by his detention
18 pending trial. That is particularly the case when the government is not responsible for the delay since
19 the Court’s last determination that there has been no violation of due process.

20 CONCLUSION

21 For the reasons set forth above, the government respectfully requests that the Court deny
22 Defendant Foakes’ motion for release.

23
24 DATED: August 11, 2021

Respectfully submitted,

25 STEPHANIE M. HINDS
26 Acting United States Attorney

27 /s/ Kevin J. Barry

28 ⁸ CR 13-0764 WHO, Dkt. 1937 at 19; Dkt. 1969 at 4.

KEVIN J. BARRY
AJAY KRISHNAMURTHY
LINA Y. PENG
Assistant United States Attorneys

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